



4312-EJ

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 2

[NPS-WASO-REGS-8546; PXXVPADO515]

RIN 1024-AD91

General Regulations; National Park System, Demonstrations, Sale or Distribution Of Printed Matter

AGENCY: National Park Service, Interior.

ACTION: Final rule.

SUMMARY: The National Park Service is amending its interim regulations governing demonstrations and the sale or distribution of printed matter applicable to most units of the National Park System. The rule clarifies provisions regarding permits for demonstrations or distributing printed matter and in management of two or more small (non-permit) groups seeking to use at the same time, an area that has been designated as available for these activities.

DATES: This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Lee Dickinson, Special Park Use Program Manager, 1849 C St., NW, Washington, DC, 20240 (202) 208-4206.

SUPPLEMENTARY INFORMATION:

Background

On October 19, 2010, the National Park Service (NPS) issued an interim rule that revised regulations at 36 CFR 2.51 and 2.52 that governed demonstrations and the sale or distribution of

printed matter applicable to most areas of the National Park System, and added two public conduct provisions to regulations at 36 CFR 2.31, that prohibit harassing visitors and obstructing public passageways. The interim rule became effective immediately upon publication in the *Federal Register* October 19, 2010 (75 FR 64148) and requested public comment.

As more fully detailed in the preamble to the interim rule, the NPS is governed by the NPS Organic Act as well as by First Amendment jurisprudence. Currently consisting of 401 park units in all 50 states, the District of Columbia, and various U.S territories, the National Park System encompasses more than 84 million acres. These park units are located in a wide range of environments as diverse as the United States itself. The size of these park units also varies tremendously, ranging from Wrangell-St. Elias National Park and National Preserve, Alaska, at 13.2 million acres to Thaddeus Kosciuszko National Memorial, Pennsylvania, at 0.02 acres. About one-third of the units of the National Park System preserve nature's many and varied gifts to the Nation, while the other two-thirds recognize benchmarks of human history in America.

The National Park System provides habitat for 378 threatened or endangered species, has more than 100 million items in museum collections, has 1.5 million archaeological sites, and has 27,000 historic and prehistoric structures. The National Park System also has an extensive physical infrastructure, which includes thousands of buildings, tens of thousands of miles of trails and roads, and almost 30,000 housing units, campground, and picnic areas as well as 3,000 water and wastewater treatment systems.

According to the NPS Statistical Abstract, in 2012 there were approximately 282 million visits to units of the National Park System that offers visitors not only visual, educational, and recreational experiences but also inspirational, contemplative, and spiritual experiences. For

neighboring Native Americans, certain National Parks are also considered sacred sites, where the NPS asks visitors to respect these long-standing beliefs.

Equally important, the National Park System has traditionally offered visitors the opportunity to engage in demonstration activity and the sale or distribution of printed matter in designated park areas. In that regard, the NPS general regulations at 36 CFR 2.51 and 2.52, applicable to parks not subject to 36 CFR 7.96(g), have governed such activities since 1983.

[Enacted]...to protect the natural and cultural resources of the parks and to protect visitors and property within the parks, [these NPS general regulations] intended effect...is to impose on those activities that involve First Amendment consideration only those narrow restrictions that are necessary to protect park resources and to ensure the management of park areas for public enjoyment.

48 FR 30252, 30272, June 30, 1983.

In 2010, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision in *Boardley v. Department of the Interior*, 615 F.3d 508 (D.C. Cir. 2010), which stemmed from a demonstration and leaflet-distribution incident at Mount Rushmore National Memorial, South Dakota, for which the NPS had required a permit. The Court of Appeals vacated §§ 2.51 and 2.52 in their entirety, based on the system-wide lack of an exception from the permit requirement for individual and small-group activity in NPS-designated free speech areas. The U.S. District Court for the District of Columbia in *Boardley v. Department of the Interior*, 605 F.Supp.2d 8 (D.D.C. 2009), had earlier also found fault with the NPS's regulatory definition of a demonstration.

Consistent with these judicial decisions and in order to avoid a regulatory vacuum that could impact the NPS's conservation mandate and the use of park areas by the public, the NPS issued the interim rule governing demonstrations and the sale or distribution of printed matter applicable to most of the National Park System. While retaining the park superintendent's ability

to designate available areas as well as the permit requirement for large groups, the NPS interim rule narrowed the definition of what constitutes a demonstration; created a small-group permit exception; detailed how the NPS addresses competing small (non-permit) groups that seek to use the same designated area; refined how applications are to be processed; and prohibited harassment of visitors by physical touch or by obstruction of building entranceways, sidewalks, and other public passageways.

Consistent with evolving First Amendment jurisprudence, the interim rule as revised by this final rule is intended to protect the natural and cultural resources of the National Park System and to protect visitors and property within the parks by imposing on demonstrators only the most limited restrictions necessary to accomplish those goals.

Response to Comments and Supplemental Explanation of the Interim Regulations

When the interim rule was published, the NPS requested public comments to be submitted by December 19, 2010. The NPS received four comments, each through the Federal eRulemaking Portal at <http://www.regulations.gov>. The NPS reviewed the comments and, besides reaffirming and incorporating by reference its explanation found in its earlier rulemaking, offers the following responses to the issues raised.

One comment disagreed with the NPS decision to exempt small groups of under 25 persons from the requirement to obtain a permit, and stated that all individuals should be required to obtain a permit, although through an easier permit process. To be consistent with the Court of Appeals decision in *Boardley*, the NPS believes that it is legally obligated to create a regulatory small-group permit exception.

Another comment stated that small groups that simply hand out printed material should not be required to get a permit, unless their activity involves tables, signs, banners, or drums.

Consistent with the Court of Appeals decision in *Boardley*, the NPS interim rule created a small-group permit exception for sale or distribution of printed matter in designated free speech areas. While the NPS interim rule at 36 CFR 2.52(b)(1) and this final rule allow for small groups to sell or distribute printed matter and use hand-carried signs without a permit, the use of stages, platforms or structures will require a permit. As the NPS explained in the preamble to the interim rule, this is because the unregulated presence of such structures would negatively impact park resources and park visitors. A permit allows the superintendent to consider the impact of the proposed equipment and to impose content-neutral, site-specific and reasonably appropriate resource-protection and safety conditions. Because a drum is a musical instrument, such use would be governed by the NPS audio disturbance regulations found at 36 CFR 2.12(a)(1)(i)-(ii).

One comment thought that by defining a small group as 25 or fewer persons, too many groups fell within the “target” of the NPS interim rule. The comment used the example of a school field trip of 26 or more students and chaperones, and expressed concern that it might be considered an unlawful demonstration if the participants communicate or express their views at a national park. The comment suggests that the small-group permit exception should be enlarged to 50 persons, to help accommodate normal school field trip activity and other gatherings.

The NPS believes that the interim rule’s more narrowly limited definition of demonstration already addressed this concern. As the NPS explained in the preamble to the interim rule:

Application of the NPS’s narrowed definition of a demonstration thus excludes visitors who merely have tattoos or are wearing baseball caps, T-shirts, or other articles of clothing that convey a message; or visitors whose vehicles merely display bumper stickers. By limiting the definition of what constitutes a demonstration, and by explicitly excluding casual park use by visitors or tourists which is not reasonably likely to attract a crowd or onlookers—such as when scout leaders or teachers engage in discussions with their charges—the NPS believes that the rule comports

with the First Amendment and is narrowly tailored to serve significant government interests.

75 FR 64150, October 19, 2010.

The NPS's selection of 25 persons as the number of individuals that generally qualify for the small-group permit exception is also consistent with the Court of Appeal's decision in *Boardley* that explicitly recognized that the agency may decide where to draw that line. 615 F.3d at 525. The NPS believes that its determination is reasonable; it also is identical to a long-standing small-group permit exception in the NPS's special regulations for the National Capital Region at 36 CFR 7.96(g)(2)(1).

One comment asked if sound systems are allowed without a permit. This question is answered by 36 CFR 2.12(a)(4), which requires individual(s) who want to operate a public address system in connection with demonstrations and special events to obtain a permit.

One comment asked if a small group needs a permit to engage in demonstration or printed matter activities that are located outside of a park-designated First Amendment area.

Consistent with the NPS's interim rule, demonstrations and printed matter distributions are limited to locations designated by the superintendent as available for these activities. If a person or group wishes to engage in such activities in an area not designated by the superintendent, the person or group may request in writing that the superintendent reconsider whether the area should be designated as available under 36 CFR 2.51(c). This regulation does not alter a dissatisfied petitioner's right, if any, to challenge a superintendent's designation of any area under 36 CFR 2.51(c) under the Administrative Procedure Act.

One comment stated that designated free speech areas needed to be clearly described to preserve the parks as educational places and asked what steps parks could take to avoid disturbances there. The NPS believes that the interim rule addressed these issues. Specifically, 36

CFR 2.51(c)(2) provides that the superintendent must designate on a map, which must be available in the office of the superintendent and by public notice, the locations designated as available for demonstrations and the sale or distribution of printed matter. As for concerns about disturbances there, any NPS action must comport with relevant First Amendment jurisprudence.

It is firmly settled under our Constitution that the public expression of ideas may not be prohibited merely because the ideas themselves are offensive to some of their hearers. *Street v. New York*, 394 U.S. 576, 592 (1969). While speech is often provocative and challenging, it is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance or unrest. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). In response to a disturbance, in a designated First Amendment area or elsewhere, the NPS will take action consistent with relevant First Amendment jurisprudence. Such NPS actions may generally center on whether the unlawful disturbance violates the NPS regulations, such as those prohibiting harassment, obstruction, or disorderly conduct at 36 CFR 2.31(a)(4)-(5), and 2.34.

Finally, the NPS interim rule's 36 CFR 2.51(b)(2) and 2.52(b)(2), and this final rule request that an organizer, who seeks to take advantage of the small-group permit exception, provide reasonable notice to the superintendent if the organizer has reason to believe there may be an attempt to disrupt, protest, or prevent the event. While not mandatory, this voluntary notice provision gives park officials an opportunity to plan additional public safety and resource protection measures. The NPS had asked for comments at 75 FR 64151, October 19, 2010, whether such notice should be made mandatory in future regulations. The NPS received no comments on this issue and will defer to future rulemaking whether such notice should be made mandatory.

Clarifications of the Interim Regulations

After further internal review, the NPS is making three clarifications and one correction to the interim rule. Two clarifications, at 36 CFR 2.51(f) and 2.52(e), are intended to make the regulatory text more explicit that the superintendent must either issue a permit or a written denial within ten days of receiving a complete and fully executed application. The ten-day action deadline, to issue either a permit or a written denial, was clearly part of the NPS's intention in the interim rule and is consistent with the Court of Appeals decision in *Boardley*, which found the NPS's regulatory deadline to be reasonable under the Supreme Court's First Amendment jurisprudence. 615 F.3d at 519 (*citing Thomas v. Chicago Park District*, 534 U.S. 316, 318 (2002)).

The third clarification, at 36 CFR 2.52(b)(4), inserts the phrase "to use." Inadvertently omitted in the initial rulemaking, the phrase clarifies the situation when a park addresses two or more (non-permitted) small groups that are seeking to use the same designated area at the same time. The paragraph is identical to 36 CFR 2.51(b)(4), and has been amended to read as set forth in the regulatory text of this rule.

Finally, the NPS is making one correction to fix a clerical error, by deleting the word "and" at the end 36 CFR 2.52(b)(1)(i). The sentence has been amended to read: None of the reasons for denying a permit that are set out in paragraph (e) of this section are present;.

Effective Date

This final rule is effective immediately. To the extent it is a substantive rule, it relieves a restriction on permit applicants, in that it provides more explicitly for a prompt response by the superintendent to the application. The other clarifications and corrections in this rule, while necessary, are essentially non-substantive. The Department of the Interior also finds that there is

good cause for making this rule effective immediately, pursuant to the Administrative Procedure Act, 5 U.S.C. 553(d)(3) and 318 DM 6.25. As noted above, the ten-day response deadline was clearly part of NPS's intention in the interim rule. Because this clarification makes the rule more consistent with the Court of Appeals decision in *Boardley*, it should go into effect immediately. Moreover, there would be a benefit to the public in making the rule effective immediately, in that it clarifies and corrects provisions governing the permit application process.

Compliance with Other Laws, Executive Orders, and Department Policy

Regulatory Planning and Review (Executive Orders 12866 and 13563).

Executive Order 12866 provides that the Office of Information and Regulatory Affairs in the Office of Management and Budget will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is significant because it will raise novel legal or policy issues. The rule amends existing NPS interim regulations applicable to most areas of the National Park System, pertaining to demonstrations and sale or distribution of printed matter. The rule also clarifies provisions governing permits for demonstrations and sale or distribution of printed matter and for managing groups engaged in these activities.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the

rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act (RFA).

This rule will not have a significant economic effect on a substantial number of small entities under the RFA (5 U.S.C. 601 *et seq.*).

The rule only amends existing NPS regulations to clarify regulatory text. Other organizations with interest in the rule will not be effected economically.

Small Business Regulatory Enforcement Fairness Act (SBREFA).

This rule is not a major rule under 5 U.S.C. 804 (2), the SBREFA. This rule:

- a. Does not have an annual effect on the economy of \$100 million or more.
- b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.
- c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act (UMRA).

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. A statement containing the information required by the UMRA, (2 U.S.C. 1531 *et seq.*) is not required.

Takings (Executive Order 12630).

Under the criteria in section 2 of Executive Order 12630, this rule does not have significant takings implications. It pertains specifically to operation and management of locations outside the NPS-National Capital Region. A takings implication assessment is not required.

Federalism (Executive Order 13132).

Under the criteria in section 1 of Executive Order 13132, the rule does not have sufficient federalism implications to warrant the preparation of Federalism summary impact statement. A Federalism summary impact statement is not required.

Civil Justice Reform (Executive Order 12988).

This rule complies with the requirements of Executive Order 12988. Specifically, this rule:

(a) Meets the criteria of section 3 (a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(b) Meets the criteria of section 3 (b) (2) requiring that all regulations be written in clear language and contain clear legal standards.

Consultation with Indian tribes (Executive Order 13175 and Department Policy).

The Department of the Interior strives to strengthen its government-to-government relationship with Indian tribes through a commitment to consultation with Indian tribes and recognition of their right to self-governance and tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in Executive Order 13175 and have determined that it has no substantial direct effects on federally recognized Indian tribes and that consultation under the Department's tribal consultation policy is not required. The rule only applies to management and operation of NPS areas outside the National Capital Region.

Paperwork Reduction Act (PRA).

This rule contains information collection requirements, and a submission under the PRA is required. A Federal agency may not conduct or sponsor and you are not required to respond to a collection of information, unless it displays a currently valid Office of Management and Budget (OMB) control number. OMB has approved the information collections in this rule and

has assigned control number 1024-0026, expiring on June 30, 2013. We estimate the burden associated with this information collection to be thirty (30) minutes. The information collection activities are necessary for the public to obtain benefits in the form of special park use permits.

National Environmental Policy Act (NEPA).

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the NEPA of 1969 is not required because the rule is covered by a categorical exclusion. We have determined that the rule is categorically excluded under 516 DM 12.5(A)(10) as it is a modification of existing NPS regulations that does not increase public use to the extent of compromising the nature and character of the area or causing physical damage to it. Further, the rule will not result in the introduction of incompatible uses which might compromise the nature and characteristics of the area or cause physical damage to it. Finally, the rule will not cause conflict with adjacent ownerships or land uses, or cause a nuisance to adjacent owners or occupants. We have also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

Effects on the Energy Supply (Executive Order 13211).

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

List of Subjects in 36 CFR Part 2

Environmental protection, National parks, Reporting and recordkeeping requirements.

In consideration of the foregoing, the National Park Service amends 36 CFR part 2 as set forth below:

PART 2—RESOURCE PROTECTION, PUBLIC USE AND RECREATION

1. The authority citation for Part 2 continues to read as follows:

Authority: 16 U.S.C. 1, 3, 9a, 462(k).

2. In § 2.51 revise the introductory text of paragraph (f) to read as follows:

§ 2.51 Demonstrations.

* * * * *

(f) *Processing the application.* The superintendent must issue a permit or a written denial within ten days of receiving a complete and fully executed application. A permit will be approved unless:

* * * * *

3. In § 2.52 revise paragraph (b)(1)(i), paragraph (b)(4), and the introductory text of paragraph (e) to read as follows:

§ 2.52 Sale or distribution of printed matter.

* * * * *

(b) * * *

(1) * * *

(i) None of the reasons for denying a permit that are set out in paragraph (e) of this section are present;

* * * * *

(4) In the event that two or more groups taking advantage of the small group permit exception seek to use the same designated available area at the same time, and the area cannot reasonably accommodate multiple occupancy, the superintendent will, whenever possible, direct the later arriving group to relocate to another nearby designated available area.

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(e) *Processing the application.* The superintendent must issue a permit or a written denial within ten days of receiving a complete and fully executed application. A permit will be approved unless:

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Dated: June 12, 2013

Michael J. Bean
Acting Principal Deputy Assistant Secretary for Fish and Wildlife and Parks

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